

Claimant alleges she developed right carpal tunnel syndrome as a result of performing housekeeping work for respondent from August 15, 2004, through

March 15, 2005. In the May 15, 2007, Award, Judge Foerschler determined claimant sustained a 10 percent right upper extremity impairment due to that condition. But the Judge also determined claimant had failed to prove her carpal tunnel syndrome arose out of her employment with respondent. Consequently, the Judge denied claimant's request for permanent disability benefits. Nonetheless, the Judge held respondent was responsible for payment of claimant's medical bills. The Judge held, in pertinent part:

While it is recognized that the types of residences claimant describes cleaning with respondent's crews is strenuous work for a 3 person crew to do, it still stretches credibility to conclude from the evidence presented that she developed crippling carpal tunnel syndrome over such a short period. For that reason no award for permanent impairment is made to her at this time. But her treatment and expense all seem to have been authorized, so the respondent should pay it.<sup>1</sup>

Claimant argues Dr. P. Brent Koprivica's report is uncontradicted that claimant's injury was caused by the work she performed for respondent and, therefore, the Judge erred by denying claimant's request for disability benefits. Claimant contends she is entitled to receive permanent disability benefits for the right upper extremity functional impairment, which ranges from three percent to 20 percent. Claimant also contends she was a full-time worker and, therefore, her average weekly wage is \$320 (\$8 per hour x 40 hours per week) for purposes of this claim. Finally, claimant requests the Board grant her future medical benefits.

Respondent, on the other hand, requests the Board to affirm the Award. Respondent argues claimant is not credible and that she initiated this claim to retaliate for her termination. In the alternative, should the Board find claimant developed the carpal tunnel syndrome due to her work, respondent argues the Board should find claimant sustained a three percent functional impairment to her right upper extremity at the forearm. In addition, respondent argues claimant worked part-time and, therefore, her average weekly wage is only \$200 (\$8 per hour x 25 hours per week).

The issues before the Board on this appeal are:

1. Did claimant's right carpal tunnel syndrome arise out of her employment with respondent?
2. If so, what is the extent of claimant's disability?
3. And what is claimant's average weekly wage?

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<sup>1</sup> ALJ Award (May 15, 2007) at 6.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Respondent is a company that cleans homes. Respondent employed claimant as one of its maids and housekeepers from August 15, 2004, through March 15, 2005, when she was terminated over a dispute presently unrelated to this claim. Claimant testified she worked on a three-member team that cleaned three- and four-story homes and that such work required the repetitive use of her upper extremities. The team would sometimes clean four or five houses in a day.

Approximately three months after commencing employment with respondent, claimant began experiencing symptoms in her right wrist and forearm. As she continued to work, claimant's symptoms increased. The evidence is uncontradicted that claimant advised her team leader, who was related to claimant, about her symptoms. But claimant did not request medical treatment for her symptoms until March 20, 2005, which was after she was terminated.

Claimant, who is right-handed, was ultimately diagnosed as having right mild carpal tunnel syndrome, which was confirmed by EMG, and in late January 2006 she underwent endoscopic carpal tunnel release surgery. The question is whether the carpal tunnel syndrome was caused or aggravated by the work claimant performed for respondent and, if so, her percentage of impairment.

Claimant particularly associated her right upper extremity symptoms to cleaning mirrors and cleaning the baseboards with a damp cloth. Claimant's surgeon, Dr. E. Bruce Toby, did not testify but the parties agreed that his medical records were part of the evidentiary record. And those records do not address the cause of claimant's carpal tunnel syndrome. On the other hand, claimant's medical expert, Dr. P. Brent Koprivica, examined claimant in late June 2006 and concluded claimant's right carpal tunnel syndrome was caused by the work she performed for respondent. The doctor wrote, in part:

Ms. Gardner's upper extremity use activities as a maid are felt to represent upper extremity use activities in terms of frequency, type and extent to which she is not exposed away from work. The general population is not exposed to this extent of upper extremity use generally.

Further, it is my opinion that Ms. Gardner's upper extremity use activities are competent to result in repetitive injury.

I would diagnose Ms. Gardner as developing carpal tunnel syndrome on the right as a consequence of her work-place activities.

Although Ms. Gardner had similar symptoms on the left, those have resolved without residual impairment.<sup>2</sup>

The Board concludes claimant's right carpal tunnel syndrome was caused by the housekeeping chores she performed for respondent. Consequently, the Board finds claimant sustained personal injury by accident arising out of and in the course of her employment with respondent. Accordingly, claimant is entitled to workers compensation benefits for that injury.

Claimant testified she was hired as a full-time employee, was paid \$8 per hour, and worked between 30 and 38 hours per week, despite missing work for court dates and other health issues. But claimant also testified she only worked 20 to 25 hours per week during some of those weeks that she missed work due to court dates or illness. Indeed, claimant complained to respondent that it reported too many hours to her landlord.

Q. (Ms. Nye) As a result of all this time that you were missing from work you didn't average 30 to 38 hours a week, did you?

A.(Claimant) Yes.

Q. You did?

A. Yes.

Q. Okay. Do you remember having a phone call with your employer on March 9, 2005?

A. March 9th?

Q. Yes.

A. No.

Q. Did you ask that your employer fax to your apartment complex how many hours a week you worked?

A. Yes.

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<sup>2</sup> Koprivica Report (June 28, 2006) at 7.

Q. Did you complain when they faxed a statement that said it was 30 to 38 hours a week, telling your employer that you actually worked more like 20 to 25 hours a week?

A. That's how it is there.

Q. Did you tell your employer that you were actually working more like 20 to 25 hours a week?

A. I didn't have to tell them that. They already knew.

Q. So you actually worked 20 to 25 hours a week?

A. No. Not all the time I didn't, no.

Q. Did you some of the time?

A. Some of the days when I had court and when I was ill.<sup>3</sup>

Betty Stewart, who owns respondent, testified her employees worked 30 to 38 hours per week. Ms. Stewart testified, in part:

Full-time to us is Monday through Friday between the hours of 8 and 5. Depending on how many homes are scheduled we work 30 to 38 hours a week. That's my standard orientation.<sup>4</sup>

It is not clear how that testimony should be construed. One construction is that Ms. Stewart considers 40 hours per week as full-time work and respondent only provides part-time work. Another construction is that she considers respondent's employees full-time workers when they work 30 to 38 hours per week. In any event, Ms. Stewart estimated claimant only worked on average 25 hours per week because of different appointments, court appearances, and personal illness. Indeed, in February 2005, Ms. Stewart warned claimant about her attendance.

The parties did not introduce any pay stubs or payroll records into evidence.

Considering the testimonies of both claimant and Ms. Stewart, the Board finds claimant did not establish that she worked full-time for respondent for purposes of K.S.A. 2004 Supp. 44-511. Claimant, at most, worked between 30 and 38 hours per week and

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<sup>3</sup> P.H. Trans. at 30, 31.

<sup>4</sup> *Id.* at 43, 44.

she often missed work due to other circumstances. In short, claimant regularly worked less than the maximum hours that were otherwise available. Based upon this somewhat inconsistent record, the Board finds claimant's average weekly wage should be based upon 30 hours per week, which yields an average weekly wage of \$240 per week when multiplied by the \$8 per hour she received.

The record contains two opinions regarding the permanent impairment claimant sustained as a result of her carpal tunnel syndrome. The treating doctor, Dr. E. Bruce Toby, determined claimant sustained a three percent impairment to her right upper extremity. Claimant's medical expert witness, Dr. P. Brent Koprivica, determined claimant sustained a 20 percent impairment to her right upper extremity. The Judge considered both functional impairment ratings, which were allegedly rendered using the fourth edition of the *AMA Guides*<sup>5</sup>, and determined claimant's upper extremity impairment was 10 percent. The Board affirms that finding.

In conclusion, claimant developed right carpal tunnel syndrome from the work she performed for respondent and, therefore, she is entitled to receive permanent disability benefits under the schedules of K.S.A. 44-510d for a 10 percent impairment to her right arm at the level of the forearm.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>6</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board modifies the May 15, 2007, Award entered by Judge Foerschler.

Aaronell LaVette Gardner is granted compensation from Betty Stewart Enterprises, Inc., and its insurance carrier for a series of repetitive traumas ending March 15, 2005, and the resulting disability. Based upon an average weekly wage of \$240, Ms. Gardner is entitled to receive 4.25 weeks of temporary total disability benefits at \$160.01 per week, or \$680.04, plus 19.58 weeks of permanent partial disability benefits at \$160.01 per week, or \$3,133, for a 10 percent permanent partial disability, making a total award of \$3,813.04, which is all due and owing less any amounts previously paid.

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<sup>5</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

<sup>6</sup> K.S.A. 2006 Supp. 44-555c(k).

Future medical benefits may be considered upon proper application to the Director.

The record does not contain a written fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire any fee in this matter, counsel must submit the written agreement to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John G. O'Connor, Attorney for Claimant  
J. Sean Dumm, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge